IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-252

Filed: 15 November 2016

Alamance County, Nos. 07 CRS 056309, 07 CRS 015377

STATE OF NORTH CAROLINA,

v.

LAWRENCE DONELL FLOOD, SR, Defendant.

Appeal by Defendant from judgment entered 20 May 2016 by Judge William O. Smith III in Alamance County Superior Court. Heard in the Court of Appeals 5 October 2016.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Cooley Law Office, by Craig M. Cooley, for Defendant-Appellant.

INMAN, Judge.

The trial court did not commit plain error by admitting expert opinion testimony tendered without objection, because the foundation for the expert's opinion satisfied the requirements of Rule 702 of the North Carolina Rules of Evidence applicable to this case.

Lawrence Donell Flood, Sr. ("Defendant") appeals from his conviction following a jury trial for first degree murder and possession of a firearm by a felon. Defendant

contends the trial court erred by admitting opinion testimony of a DNA analyst because the testimony did not meet the recently amended test for validity under Rule 702 of the North Carolina Rules of Evidence. After careful review, we find no plain error.

I. Factual and Procedural History

In 2007, Defendant was indicted for first degree murder, first degree kidnapping, and possession of a firearm by a felon. On 9 December 2009, a jury found Defendant guilty on all charges. The jury recommended a sentence of life imprisonment without the possibility of parole, and Defendant appealed, arguing that the trial court erred by admitting evidence of Defendant's 1994 conviction of first degree aggravated manslaughter and unlawful possession of a weapon. This Court, in *State v. Flood* ("*Flood I*"), 221 N.C. App. 247, 726 S.E.2d 908 (2012), vacated Defendant's conviction and remanded for a new trial.

Defendant's new trial began on 4 May 2015. Among the State's evidence, the State presented expert testimony from Sharon Hinton, a scientist in the field of forensic biology and DNA analysis. Hinton testified that a sample taken from the concrete patio behind Defendant's apartment contained the mixed DNA of the victim and one other person. Hinton further testified that based on the profiles identified in the sample, Defendant could not be ruled out as the second source of DNA.

Following the trial, the jury on 20 May 2015 returned a verdict finding Defendant guilty on all charges. In an order granting appropriate relief, the trial court vacated Defendant's conviction of first degree kidnapping. Defendant gave oral notice of appeal for the remaining convictions.

II. Expert Testimony

Defendant contends the trial court committed plain error by admitting expert testimony regarding DNA evidence found outside Defendant's apartment. We disagree.

A. Amendments to Rule 702

In 2011, the General Assembly amended our Rules of Evidence, which the Supreme Court recently held had the effect of "adopt[ing] the federal standard for the admission of expert witness testimony articulated in the *Daubert* line of cases." *State v. McGrady*, 368 N.C. 880, 884, 787 S.E.2d 1, 5 (2016). The General Assembly designated this Rule applicable to all actions arising on or after 1 October 2011. Act of 17 June 2011, ch. 283, sec. 1.3, 2011 N.C. Sess. Law 1048, 1049. Prior to this adoption, our courts followed an analysis that was "decidedly less mechanistic and rigorous than the 'exacting standards of reliability' demanded by the federal approach[,]" despite sharing some "obvious similarities with the principles underlying *Daubert* . . . ." *McGrady*, 368 N.C. at 886, 787 S.E.2d at 7 (citations omitted). Our courts concluded that North Carolina law "favored liberal admission

of expert witness testimony" leaving the jury to determine its weight and credibility, over the federal "gatekeeping" approach derived from *Daubert*. *Id.*

Whether the amended version or the earlier version of Rule 702 applies is determined by the date the action arose. This Court has held, in the context of the newly amended Rule 702, that criminal actions arise "on the date that the bill of indictment was filed." *State v. Gamez*, 228 N.C. App. 329, 333, 745 S.E.2d 876, 879 (2013). *Gamez* expressly rejected the start of the trial as "the trigger date for applying the amended version of Rule 702(a) . . . ." *Id.* at 333, 745 S.E.2d at 878. *Gamez* further noted that "[w]hile there was a second bill of indictment filed on 12 December 2011 that was subsequently joined for trial, [that] criminal proceeding arose on the date of the filling of the first indictment." *Id.* at 333, 745 S.E.2d at 879.

Defendant was indicted for first degree murder and first degree kidnapping on 27 August 2007, and possession of a firearm by a convicted felon on 17 September 2007. Although Defendant's second trial began on 4 May 2015, Defendant was not recharged under a new indictment. Defendant's case arose on 27 August 2007—the date of the first indictment—prior to the effective date of the amended Rule 702. Therefore, the earlier version of Rule 702 governs our review.

B. Standard of Review

Defendant did not properly preserve the issue of admissibility of the expert's opinion testimony at trial because he failed to lodge an objection when the challenged

testimony was elicited. "Unpreserved error in criminal cases . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (citing N.C. R. App. P. 10(a)(4)). To show plain error, "a defendant must demonstrate that a fundamental error occurred at trial." *Id.* at 518, 723 S.E.2d at 334 (citation omitted). A fundamental error requires defendant to establish prejudice, *i.e.*, that it "had a probable impact on the jury's finding that the defendant was guilty." *Id.* (citations and quotation marks omitted).

C. Analysis

The pre-amended Rule 702 required trial courts to engage in "a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citation omitted). Considering the record and North Carolina precedent, we conclude that the expert testimony at issue here met all three prongs of the test pronounced in *Howerton*.

With respect to the first prong, we "look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable." *Id.* at 459, 597 S.E.2d at 687. Our Courts have previously held that DNA evidence and profile testing with a proper foundation is generally

admissible as an established technique considered reliable within the scientific community. *See, e.g., State v. Williams*, 355 N.C. 501, 553, 565 S.E.2d 609, 640 (2002) (recognizing the admissibility of DNA evidence); *State v. Pennington*, 327 N.C. 89, 101, 393 S.E.2d 847, 853-54 (1990) (accepting DNA profiling evidence as admissible); *McLean v. Mechanic*, 116 N.C. App. 271, 277, 447 S.E.2d 459, 462-63 (1994) (recognizing DNA profile testing as generally admissible, even where conflicting expert testimony exists regarding the procedure and interpretation of the DNA testing).

Here, the record reveals that the State tendered, without objection, Sharon Hinton as an expert witness in the field of forensic biology including the field of DNA analysis. Hinton testified about her familiarity with the testing done on the DNA sample at issue, the results of the testing, and limitations of those particular tests with respect to positively identifying an individual as opposed to merely being unable to exclude them from the sample. Hinton further testified about her training, education, and prior experiences as a tendered expert in the fields of forensic biology and DNA analysis, satisfying the second prong of the *Howerton* test. Hinton's testimony also satisfied the third prong of the *Howerton* test because it was relevant, as it corroborated the testimony of the State's other witnesses and provided direct evidence that Defendant could not be ruled out as the second source of DNA. Given Hinton's testimony regarding the basis of her opinion, her education and experience,

and the relevance of her opinion, we hold that the trial court did not commit plain error in allowing Hinton to testify as to the DNA sample found on the concrete slab outside of Defendant's apartment.

III. Conclusion

For the reasons above, we hold the trial court did not commit plain error by admitting the expert testimony concerning the DNA profiling from the DNA sample discovered on the concrete slab of Defendant's apartment.

NO PLAIN ERROR.

Judges DAVIS and ENOCHS concur.

Report per Rule 30(e).